Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1745

GREGORY SCAFIDI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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GREGORY SCAFIDI,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gregory Scafidi petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The order of the Court of Appeals (Group Appendix A, *infra*, pp. A1-A9) is not reported.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit was entered on March 4, 1980. A timely Petition for Rehearing was filed on March 12, 1980. On April 9, 1980 the Petition for Rehearing with *en banc* suggestions was denied (App. B, *infra*). This petition is filed within thirty (30) days of April 9, 1980 and the jurisdiction of this court is invoked in accordance with 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether it is of exceptional importance in the administration of criminal justice within the federal courts to determine the proper admonitions to a defendant, waiving a jury trial, where over 45 percent of criminal trials in the federal courts from June 30, 1978 to June 30, 1979 were bench trials?[1]

CONSTITUTIONAL PROVISIONS AND RULES

The federal Constitution contains two (2) provisions relating to the subject. Article 3, § 2, Cl. 3, provides:

> "The trial of all crimes, except in cases of impeachment, shall be by jury . . ."

* * *

[1] Cf., Annual Report, Administrative Office of the United States Courts (App. C, *infra*).

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .".

Rule 23, Fed.R.Crim.Proc., states:

> **Rule 23. Trial by Jury or by the Court**
>
> **(a) Trial by Jury.** Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.
>
> **(b) Jury of Less Than Twelve.** Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12 or that a valid verdict may be returned by a jury of less than 12 should the court find it necessary to excuse one or more jurors for any just cause after trial commences.
>
> **(c) Trial Without a Jury.** In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.
>
> (As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 26, 1976, eff. Oct. 1, 1977; Pub.L. 95-78, § 2(b), July 30, 1977, 91 Stat. 320.)

In pertinent part, 21 U.S.C. § 846 reads:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

Gregory Scafidi (hereinafter petitioner) was charged in a multi-count indictment on January 9, 1979 with drug related offenses.[2] At all times herein pertinent petitioner was represented by counsel. Commencing June 8, 1979 petitioner stood trial in the U.S. District Court, Chicago, Illinois (Grady, J., presiding). On June 8, 1979 petitioner and two (2) other co-indictees waived a jury trial. The totality of the colloquy as between the trial judge and the three (3) defendants waiving the jury trial was as follows:

> "THE COURT: So, as I understand it, then we have three defendants who are going to trial, all taking bench trials, and the Defendants Pestine and Rodriguez are going to change their pleas.
>
> MR. CLAVELLI: That is correct, your Honor.
>
> THE COURT: Well, then, let's do this first. Let's execute the jury waivers and let me ask the Defendants Scafidi, Shemwill and Toomey to please step forward.
>
> Let's see. This is Scafidi in the blue coat, and this is Mr. Toomey and this is Mr. Shemwill.
>
> You gentlemen all have a right to be tried by a jury of 12 people who would determine whether you are guilty or innocent of these charges. Do you understand that, Mr. Scafidi?
>
> MR. SCAFIDI: Yes, I do.
>
> THE COURT: And Mr. Shemwill?
>
> MR. SHEMWILL: Yes, I do.

[2] O.R. 2 (original record). The multiple count indictment, charged that petitioner conspired with others to deliver a controlled substance in Chicago, Illinois on December 11, 1978 (Count 1, 21 U.S.C. § 846). In Count 4 of the same indictment petitioner was charged with distributing the same controlled substances alleged in Count 1 (21 U.S.C. § 846(a)(1)).

> THE COURT: And Mr. Toomey?
>
> MR. TOOMEY: Yes, sir.
>
> THE COURT: On the other hand, you can be tried by me, in which case there will be no jury and I will not only decide what the law is, I will also determine what the facts are in the case. That's what the jury would do if there was a jury trial. If there is no jury, then I do that, the fact finding.
>
> Do you understand that?
>
> MR. SCAFIDI: Yes, sir.
>
> MR. TOOMEY: Yes, sir.
>
> MR. SHEMWILL: Yes, sir.
>
> THE COURT: Now, Mr. Scafidi, do you desire to be tried by the Court rather than by a jury?
>
> MR. SCAFIDI: Yes, sir.
>
> THE COURT: And Mr. Toomey, do you desire to be tried by the Court rather than by a jury?
>
> MR. TOOMEY: Yes, sir.
>
> THE COURT: Mr. Shemwill, do you desire to be tried by the Court rather than by a jury?
>
> MR. SHEMWILL: Yes, sir.
>
> THE COURT: All right, then we will ask each of the defendants who have so indicated to execute a written waiver of trial by jury.
>
> MR. SAMUELS: Tendering our executed jury waiver, your Honor, on behalf of Mr. Shemwill.
>
> THE COURT: All right.
>
> MR. ACKERMAN: Likewise, on behalf of Mr. Scafidi, if the Court please.
>
> MR. SUFFREDIN: And on behalf of Mr. Toomey, your Honor.
>
> THE COURT: All right, I have added my signature to each of those waivers and they may be filed. Very well. I think we can excuse those three defendants for about ten minutes. Why don't you come back at about 10:45.
>
> MR. SAMUELS: Thank you." (Tr. 4-6)

An executed (written) jury waiver by petitioner is found at O.R. 22 and a facsimile of that jury waiver is reproduced at App. D, *infra*. While petitioner raises no

question as to the sufficiency of the evidence, nonetheless, a short overview is presented. The government's evidence, during this bench trial, revealed that from late November, 1978 to approximately December 11, 1978 certain undercover DEA agents had frequent contact with co-indictees Rodriguez, Shemwill, Mustari and Twomey. These individual defendants were jointly responsible for two (2) separate (perhaps unrelated) deliveries of PCP to a government undercover agent. One delivery (for $800) was at the Bradley International Airport, Boston, Massachusetts, on November 20, 1978 and a second delivery took place in Chicago on November 30, 1978 ($4200). The government offered no evidence to tie the petitioner into either of these deliveries. The evidence below revealed that on December 11, 1978 co-indictees Shemwill and Rodriguez delivered a quantity of PCP to the government undercover agents at a restaurant near the O'Hare Airport. The government alleged that petitioner made available the drugs that were distributed on December 11, 1978 in Chicago. Petitioner testified on his own behalf. Petitioner agreed that he proffered to one of the co-indictees (Pestine) a plastic bag but petitioner denied knowing the contents therein.

The bench trial ended on June 12, 1979 and petitioner was found guilty of both counts. On July 11, 1979 petitioner was sentenced to four (4) years in custody on Count 1, with probation to follow on Count 4.[3]

[3] Petitioner was represented by counsel at arraignment and trial. Petitioner has been at large on an O.R. bond pending disposition of this petition.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, even while affirming, opined:

> "While we do *not believe that the colloquy in this case was a model and that further questioning and further explanation of the consequences of a decision to waive a jury trial would help ensure that a waiver is knowingly and voluntarily made*, we find that it satisfied the Scott rule."[4]

This court in *Gannett Co., Inc. v. DePasquale*, ... U.S. ....., 99 S.Ct. 2898 (1979) ruled that neither the public nor the press had a pure constitutional right to attend excluded portions of a criminal trial. By way of *dicta*, the court noted:

> Thus, because of the great public interest in jury trials as the preferred mode of fact-finding in criminal cases, a defendant cannot waive a jury trial without the consent of the prosecutor and judge. *Singer v. United States, supra*, 380 U.S., at 38, 85 S.Ct., at 791; *Patton v. United States, supra*, 281 U.S., at 312, 50 S.Ct., at 263. But if the defendant waives his right to a jury trial, and the prosecutor and the judge consent, it could hardly be seriously argued that a member of the public could demand a jury trial because of the societal interest in that mode of fact-finding. Cf. Fed.Rule Crim. Proc. 23(a) (trials to be by jury unless waived by a defendant, but the court must approve and the prosecution must consent to the waiver). 99 S.Ct. at 2907.

In *Gannett ante*, the court had no occasion to review either the "elements" of a jury waiver . . . or the

[4] Cf., App. A-4, *infra*. The Circuit Court reference to *Scott* refers to *U.S. v. Scott*, 583 F.2d 362 (C.A. 7, 1978).

confusion within the circuits regarding the necessary components of a valid jury waiver. The court, in *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236 (1943) reversed the Circuit Court. That court (126 F.2d 774) found that the lay-defendant did not have the power to waive a jury within the federal district courts. This court (in a 5-4 decision) ruled to the contrary. The court said:

> We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with *his express, intelligent consent*, where the Government also consents, and where such action is approved by the responsible judgment of the trial court. *Patton v. United States*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854, 70 A.L.R. 263. And whether or not there is an *intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case.* (317 U.S. at 278)

The last sentence in *Adams* has provided the impetus for the disarray within the several circuits. Some courts have likened Rule 23 to Rule 11, F.R. Cr. Pro.[5] Another court has suggested the use of 28 U.S.C. § 2255 in a jury waiver contest (*U.S. v. Hunt*, 413 F.2d 983 at 984, (C.A. 4, 1969). Some courts have suggested that the trial judge inquire into the reasons and motives behind the jury waiver (*Woodcock v. McCauley*, 563 F.2d 806 at 807 (C.A. 7, 1977) while other courts have found that inquiries regarding coercion or promises in connection with a jury waiver, are seemingly beyond the parameters of Rule 23 (cf., *U.S. v. Mitchell*, 427 F.2d at 1281-1282 (C.A. 3,

[5] *U.S. v. Straite*, 425 F.2d 594 at 595 (D.C., 1970); *U.S. v. Strother*, 578 F.2d 397 at 404-405 (D.C., 1978); *Estrada v. U.S.*, 457 F.2d 255 (C.A. 7, 1972); *U.S. v. Scott*, 583 F.2d 362 (C.A. 7, 1978).

1970). *Dranow v. U.S.*, 325 F.2d 481 at 483, (C.A. 8, 1963).

Rule 23 considers the possibility of "special findings" in a case trial without a jury. In *Howard v. U.S.*, 423 F.2d 1102 (C.A. 9, 1970) the court reversed the drug conviction where that jury waiver was conditioned on the waiving of the trial court's finding of "special facts" (523 F.2d at 1104).[6]

Some courts, while declining to reverse bench trial convictions, where the jury waiver question was raised, pointed out, while affirming, that the trial judge told a defendant of the "advantages" of having a jury trial.[7]

Recently, the court granted a new trial in *U.S. v. Lockwood*, 604 F.2d 7 (C.A. 5, 1979). While granting a new trial, that court strictly construed Rule 23, as follows:

> "The trial below took place without a jury despite the absence of a written waiver by the defendant. Fed.R.Crim.P. 23(a) required this case to be tried by jury 'unless the defendant waive[d] a jury trial in writing with the approval of the court and the consent of the government.' We need not consider whether an oral waiver will suffice, *cf. Horne v. United States*, 264 F.2d 40, 41-42 (5th Cir.), *cert. denied*, 360 U.S. 934, 79 S.Ct. 1460, 3 L.Ed.2d 1549 (1959), because this record contains nothing that would indicate that the defendant, by *his* words or conduct, waived his right to a trial by jury. We reject the Government's invitation to remand the case for the limited purpose of holding a hearing to determine whether a waiver in fact occurred. The

[6] In accord: *U.S. v. Livingston*, 459 F.2d 797 (C.A. 3, 1972) (*en banc*) and *U.S. v. Morris*, 263 F.2d 594 (C.A. 7, 1959).

[7] *U.S. v. Titus*, 576 F.2d 210 at 211, (C.A. 9, 1978); *U.S. v. Livingston*, 459 F.2d at 799 (C.A. 3, 1972) (dissenting judge, *en banc* decision).

appellant is entitled to a new trial before a jury unless he elects to proceed before the court in a bench trial under rule 23(a)." 604 F.2d at 8 (C.A. 5, 1979)

This petition provides a vehicle for the court to decide the propriety and scope of the Rule 23 admonitions. It is exceptionally important in light of the fact that from June, 1978 to June, 1979 there were 6,799 completed federal criminal trials. Of that number 3,132 were non-jury (cf., App. C, *infra*).

ARGUMENT

Our research has failed to disclose any recent decision by this court touching on the parameters of Rule 23, save for *Gannett, ante* (99 S.Ct. at 2907). The petition at bar represents an example of the decisional/circuit uncertainty as regarding this court's decision in *Adams*.[8] The heart of the matter is as follows:

(a) Need the trial judge personally admonish the defendant regarding the giving up of a jury trial?

(b) If yes, what is the acceptable scope of the admonitions from the trial judge to the defendant?

It is the view of the petitioner that the trial judge must carefully and fully admonish the jury-waiving defendant. The admonitions must parallel Rule 11. Certainly *McCarthy* provides viable insight into the interplay as between the trial judge and the defendant.[9]

[8] 317 U.S. 269, 63 S.Ct. 236 (1943).

[9] In *McCarthy v. U.S.*, 394 U.S. 459, 89 S.Ct. 1166 (1969) the court ruled (under its supervisory powers) that a valid Rule 11 guilty plea must carry with it personal admonitions from

(Footnote continued on following page)

The spectrum of circuit cases may well cause the government to agree that this case is appropriate for review. In *U.S. v. Scott*, 583 F.2d 362 (C.A. 7, 1978) the court while affirming a conviction found, that under its supervisory powers, cases heard after October 1, 1978 *must* demonstrate that the trial judge perform admonitions which parallel Rule 11 . . . in order that the waiver of the jury trial be considered valid (*id.* at 364). At least one other circuit finds the parallel between Rule 11 and Rule 23 a matter akin to necessity (*U.S. v. Straite*, 425 F.2d 594 at 595 (D.C. Cir., 1970); *U.S. v. Strother*, 578 F.2d 397 at 404-405 (D.C. Cir., 1978)).

Adding to the orbit of uncertainty we find that the "special findings" provisions of Rule 23(c) have added additional concern to courts of review. For example, in *U.S. v. Livingston*, 459 F.2d 797 (C.A. 3, 1972) (*en banc*) that court reversed the conviction because the trial court conditioned the non-jury trial on a waiver of "special finding" (*id.* at 798). Similar reversals are recorded in *Howard v. U.S.*, 423 F.2d 1102 (C.A. 9, 1970) where that court reversed the federal drug conviction where the trial judge conditioned the jury waiver upon the defendant's withdrawing the request for special findings . . . at the urging of the trial judge (423 F.2d at 1104). The Seventh Circuit reached a similar result in *U.S. v.*

[9] *continued*
the trial court to the guilty pleading defendant. In *U.S. v. Timmreck*, ... U.S. ..... , 99 S.Ct. 2085 (1979) the court reaffirmed *McCarthy* suggesting that Rule 11 deficiencies be raised on direct appeal (99 S.Ct. at 2087). Of course, the petition at bar represents a direct appeal, as opposed to a request for collateral relief under 28 U.S.C. § 2255 (cf., in *U.S. v. Hunt*, 413 F.2d 983 at 984 (C.A. 4, 1969) that court suggested that the invalidity of a jury waiver could be raised on § 2255)). Such an approach would only foster the perpetuation of litigation.

Morris, 263 F.2d 594 (C.A. 7, 1959). These decisions demonstrate that a literal reading of Rule 23(c) mandates reversal where the rule is not followed by the trial judge. The difficulty with all this is simply that Rule 23(a) sets out no procedural approach for an intelligent and voluntary jury waiver (See *Adams*, 317 U.S. at 278). In *Adams* the court stated that the validity of the jury waiver will depend upon the unique circumstances of EACH CASE . . . and the waiver must be express, intelligent, and competent (317 U.S. at 278). Rule 23(a) . . . lacks the same directives.

As our statement of the case points out (pp. 4-6) the petitioner was not alone while waiving the jury. Two (2) co-indictees were likewise waiving their trial-jury rights during the same colloquy.[10] The court might find it uncomfortable for three (3) indictees to be intelligently, knowingly, understandably and voluntarily waiving a jury trial (and all the Sixth Amendment protections that flow therefrom) with barely two (2) transcript pages. Surely the court could have considered, indeed should have considered, both the motives and the reasons, for

[10] In *U.S. v. Fels*, 599 F.2d 142 (C.A. 7, 1979) the court reversed a guilty plea federal drug conviction finding, *inter alia*, that the taking of guilty pleas from multiple defendants, without really singling out the Rule 11 admonitions was, and is, fraught with the possibility of gross misunderstanding. So it is, in our view, with taking jury waivers from multiple defendants without extensive admonition(s) and a piercing inquiry into the background and reasons for same. In *The American Jury* (Kalven & Zeisel) (1966) an erudite discussion contains the fact that defense counsel places great emphasis on the "cost-factor" as between jury and non-jury trials (pg. 27, n. 27). The same study shows that there is a direct correlation between a guilty plea and a non-jury trial (pg. 26). This same study (*The American Jury*) has been referred to by the court in *Spencer v. Texas*, 385 U.S. 554 (1967); *U.S. v. Jackson*, 390 U.S. 570 (1968); *Williams v. Florida*, 399 U.S. 78 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

the jury waiver. In *Woodcock v. McCauley*, 563 F.2d 806 (C.A. 7, 1977) the court reversed the denial of habeas relief where a coerced jury waiver was alleged. The court, in *Woodcock*, pointed out:

> The court further inquired of Mr. Woodcock whether any "threats" or "promises" had been made to him to induce his waiver, to which Mr. Woodcock responded "no." The court did not ask Mr. Woodcock why he was waiving his right to jury trial, nor did Mr. Woodcock volunteer such information. (563 F.2d at 807)

Additional authorities discounting the need for jury waiver motives include *U.S. v. Mitchell*, 427 F.2d at 1281-1282 (C.A. 3, 1970) and *Dranow v. U.S.*, 325 F.2d 481 (C.A. 8, 1963).

In both *U.S. v. Titus*, 576 F.2d 210 (C.A. 9, 1978) and *U.S. v. Livingston*, 459 F.2d at 799 (C.A. 3, 1972) (*en banc*, dissenting judge) the court considered, as relevant on the jury waiver question, the fact that the trial judge told each of those defendants about "the advantages of a jury trial" (576 F.2d at 211; 459 F.2d at 799). Rule 23(a) . . . does not at all consider the "advantages" of a jury trial.

In *U.S. v. Reyes*, 603 F.2d 69 (C.A. 9, 1979) the court reversed a conviction by a jury of less than twelve (12). While discussing Rule 23 the court offered the following:

> The function served by questions from the trial judge in open court on the record is most apparent in the procedures governing acceptance of guilty pleas, *see* Fed.R.Crim.P. 11. Similarly, courts discussing the validity of a defendant's waiver of a jury trial under Fed.R.Crim.P. 23(a) have emphasized the importance of detailed questioning of the defendant in open court at the time of the waiver. *See, e.g., United States v. David*, 167 U.S.App.

D.C. 117, 122-123, 511 F.2d 355, 360-62 (1975). Indeed, even when a defendant has signed a written stipulation waiving his right to a jury trial, courts have recognized that

> it is better practice for a district judge, when advised by a defendant that he desires to waive his right to a jury trial, to interrogate the defendant so as to satisfy himself that the defendant is fully apprised of his rights and freely and voluntarily desires to relinquish them. Such an interrogation would provide the district judge with an additional factual basis on which to grant or withhold his approval of the waiver.

United States v. Hunt, 413 F.2d 983, 984 (4th Cir. 1969). (605 F.2d at 71)

Once again, we point out that another circuit court finds a parallel as between Rule 11 and Rule 23 (thus the Ninth Circuit joins the Seventh and D.C. Circuits).

On the balance, the petitioner presents a question of exceptional importance to the administration of criminal justice in the federal courts. The composite uncertainty of Rule 23 application merits the granting of this petition.

CONCLUSION

The petitioner at bar respectfully urges that this court grant this petition for certiorari and vacate the order of the circuit court affirming the conviction and sentence.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

(Argued January 21, 1980)

March 4, 1980.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 79-1812 and 79-1826 vs.

GREGORY ANDREW SCAFIDI and EDWIN SHEMWILL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-909—JOHN F. GRADY, *Judge.*

ORDER

Defendants, Gregory Scafidi and Edwin Shemwill, appeal their convictions following a bench trial for unlawfully distributing and possessing with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1), and

for conspiring to commit the same offense in violation of 21 U.S.C. § 846. Both defendants argue on appeal that the court's on the record questioning concerning each defendant's waiver of a jury trial was inadequate. Defendant Scafidi argues further that the evidence showed that he was involved in only a small separate conspiracy, not the single overall conspiracy charged in the indictment, and this variance between indictment and proof requires reversal. As a final argument Scafidi contends that the trial court committed reversible error in refusing to grant his motion for a severance. We affirm.

Jury Waiver

Before trial, the defendants expressed a wish to waive their right to a jury trial.[1] Judge Grady and the government approved the signed jury waiver of each defendant as required by rule 23(a) of the Federal Rules of Criminal Procedure.[2] Judge Grady briefly interrogated each defendant concerning his decision to waive a jury trial.[3]

---

1 A third defendant, Terrence Toomey, also waived a jury trial. The court found Toomey not guilty.

2 Rule 23(a) provides:

> (a) TRIAL BY JURY. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

3 This interrogation at the trial occurred as follows:

The Court: So, as I understand it, then we have three defendants who are going to trial, all taking bench trials, and the Defendants Pestine and Rodriguez are going to change their pleas.

Mr. Clavelli: That is correct, your Honor.

The Court: Well, then, let's do this first. Let's execute the jury waivers and let me ask the Defendants Scafidi, Shemwill and Toomey to please step forward.

Let's see. This is Scafidi in the blue coat, and this is Mr. Toomey and this is Mr. Shemwill.

(footnote continued on following page)

The defendants contend, however, that this interrogation was inadequate to ensure that the waiver was informed and intentional, and that it was not in compliance with this circuit's supervisory rule on jury waivers announced in *United States* v. *Scott,* 583 F.2d 362 (7th Cir. 1978). The

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3 *Continued*

You gentlemen all have a right to be tried by a jury of 12 people who would determine whether you are guilty or innocent of these charges. Do you understand that, Mr. Scafidi?

Mr. Scafidi: Yes, I do.

The Court: And Mr. Shemwill?

Mr. Shemwill: Yes, I do.

The Court: And Mr. Toomey?

Mr. Toomey: Yes, sir.

The Court: On the other hand, you can be tried by me, in which case there will be no jury and I will not only decide what the law is, I will also determine what the facts are in the case. That's what the jury would do if there was a jury trial. If there is no jury, then I do that, the fact finding.

Do you understand that?

Mr. Scafidi: Yes, sir.

Mr. Toomey: Yes, sir.

Mr. Shemwill: Yes, sir.

The Court: Now, Mr. Scafidi, do you desire to be tried by the Court rather than by a jury?

Mr. Scafidi: Yes, sir.

The Court: And Mr. Toomey, do you desire to be tried by the Court rather than by a jury?

Mr. Toomey: Yes, sir.

The Court: Mr. Shemwill, do you desire to be tried by the Court rather than by a jury?

Mr. Shemwill: Yes, sir.

The Court: All right, then we will ask each of the Defendants who have so indicated to execute a written waiver of trial by jury.

Mr. Samuels: Tendering our executed jury waiver, your Honor, on behalf of Mr. Shemwill.

The Court: All right.

Mr. Ackerman: Likewise, on behalf of Mr. Scafidi, if the Court please.

Mr. Suffredin: And on behalf of Mr. Toomey, your Honor.

The Court: All right, I have added my signature to each of those waivers and they may be filed.

defendants further argue that the colloquy in this case was inadequate to guard against potential misunderstandings and inducements which may prevent a waiving defendant from being fully informed about the consequences of his waiver.

The adequacy of a record for an appellate court to conclude that a jury waiver has been knowingly and intentionally made has been before this court on several occasions. Until August of 1978 we only noted the desirability of the trial judge's interrogation on the record of the defendant, but we did not find any such interrogation required by rule 23(a) of the Federal Rules of Criminal Procedure or the Constitution. *See, e.g., United States* v. *Kidding,* 560 F.2d 1303 (7th Cir.), *cert. denied,* 434 U.S. 872 (1977); *Estrada* v. *United States,* 457 F.2d 255 (7th Cir.), *cert. denied,* 409 U.S. 858 (1972). In August of 1978, in *United States* v. *Scott,* this court, under its supervisory power, announced a rule to be effective September 30, 1978. We said, "[t]he rule now announced . . . requires that before a district court accepts a waiver of jury trial the court will interrogate the defendant to ensure that he understands his right to a jury trial and the consequences of his waiver. Once the rule goes into effect, failure to comply will call for reversal on appeal." *Scott,* 583 F.2d at 364.

While we do not believe that the colloquy in this case was a model[4] and that further questioning and further explanation of the consequences of a decision to waive a jury trial would help ensure that a waiver is knowingly and voluntarily made, we find that it satisfied the *Scott*

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4 Defendants argue that the colloquy was insufficient because the trial court did not ask the defendants why they were giving up their right to trial by jury and what inducements or promises, if any, had been made to them concerning the waiver. They also contend that a fuller explanation of the consequences of such a waiver is required. Particularly, they claim that a waiving defendant must be informed that the jury must be unanimous to convict.

rule. The trial judge did question the waiving defendants and explained to them that the waiver of a jury trial meant that the judge would decide both the law and the facts and would determine the guilt or innocence of each defendant. There is no suggestion of anything in the record which tends to impeach the voluntariness of the waivers or the recitation by the defendants that they understood what they were doing. Absent such a suggestion[5] *Scott* does not require a more particularized interrogation.[6]

We disagree with the defendants' contention that the *Scott* rule mandates a particularized questioning comparable to that required for the acceptance of a guilty plea under rule 11 of the Federal Rules of Criminal Procedure. Rule 11 provides for extensive procedural safeguards for a defendant who expresses a desire to forgo his trial completely and to accept the consequences of his guilt. In *Scott* we only indicated that, analogous to rule 11, a trial judge must interrogate on the record a defendant who wishes to waive his right to a jury trial. *Scott* did not require the elaborate safeguards of rule 11.

Single Ongoing Conspiracy

Defendant Scafidi next claims that the evidence adduced at trial showed that he was only involved in one incident of distributing phencyclidine (PCP), a controlled substance

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5 We do not find persuasive defendants' suggestion that when there are multiple defendants simultaneously waiving a jury trial more questioning is required.

6 We also note that Judge Grady's colloquy satisfied the American Bar Association standard for waiver of a jury trial. That standard provides:

> (b) The court should not accept a waiver unless the defendant, after being advised by the court of his right to trial by jury, personally waives his right to trial by jury, either in writing or in open court for the record.

ABA Project on Minimum Standards for Criminal Justice, *Trial by Jury,* § 1.2(b) (1968).

within the meaning of 21 U.S.C. § 841(a)(1), and there is no direct evidence showing his involvement in other incidents, so the evidence established he was a member of a small separate conspiracy to distribute PCP. He contends that since the indictment charged one large conspiracy and the evidence showed he was only a member of a smaller separate conspiracy, the variance between indictment and proof requires a reversal.

The government has the burden to prove the overall conspiracy charged in the indictment beyond a reasonable doubt. *United States* v. *Taylor,* 562 F.2d 1345, 1351 (2d Cir.), *cert. denied,* 432 U.S. 909 and 434 U.S. 853 (1977). Whether this burden has been met is a question of fact and after a determination that the evidence adduced at trial met this burden, the determination will be affirmed on appeal unless, when viewing the evidence in the light most favorable to the government, the finding of the single conspiracy charged was, as a matter of law, insufficient to prove the conspiracy charged beyond a reasonable doubt. *Id.; United States* v. *Varelli,* 407 F.2d 735, 746 (7th Cir. 1969).

In *United States* v. *Varelli,* this court indicated what, as a matter of law, is required to find one overall conspiracy. We said

> The distinction must be made between separate conspiracies, where certain parties are common to all and one overall conspiracy with various parties joining and terminating their relationship at different times. Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with these core conspirators and others to achieve a common goal may be members of an overall conspiracy.
>
> In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy.

Id. at 742. It is not necessary that each co-conspirator know the identity of the other co-conspirators so long as the parties to the conspiracy know of the existence of the co-conspirators and share a common purpose with those known co-conspirators. *United States* v. *Lindsey,* 602 F.2d 785, 787 (7th Cir. 1979); *United States* v. *Friedman,* 593 F.2d 109, 115 (9th Cir. 1979); *Developments in the Law —Criminal Conspiracy,* 72 Harv. L. Rev. 920, 927-29 (1959). In addition, direct evidence of the agreement and the co-conspirator's awareness of the other co-conspirators is not necessary, so long as these factors may reasonably be inferred from an assessment of the criminal enterprise. *United States* v. *Friedman,* 593 F.2d at 115; *United States* v. *Taylor,* 562 F.2d at 1352. It is also important to note that "it has been consistently held . . . that proof of large scale distribution of smuggled narcotics contraband gives rise to an inference of participation in a single organization conspiracy. . . ." *United States* v. *Burman,* 584 F.2d 1354, 1356 (4th Cir. 1978), *cert. denied,* 439 U.S. 1118 and 440 U.S. 922 (1979). *See, e.g., United States* v. *Friedman,* 593 F.2d 109; *United States* v. *Boyd,* 595 F.2d 120 (3d Cir. 1978); *United States* v. *Taylor,* 562 F.2d 1345.

A review of the record in the light most favorable to the government reveals the following. On November 20, 1978 Peter Mustari met with undercover agent Petz at Bradley Airport in Windsor Locks, Connecticut. At that meeting they discussed the possibility that Petz could purchase some pound quantities of PCP. Mustari informed agent Petz that his source of supply was in Chicago and that Petz would have to travel to Chicago to obtain the PCP. In the next couple of weeks agent Petz had a series of telephone conversations with Mustari. In one such conversation Petz explained that he would fly to Chicago on November 30, 1978 and contact Mustari concerning the purchase of $4,000 of PCP. On November 30 Petz flew to Chicago and pur-

chased four ounces of PCP from Mustari, and another defendant Rodriguez. At that point Petz continued to express a desire to purchase larger quantities of PCP.

Following more telephone conversations, Petz returned to Chicago on December 11, 1978 to meet with Mustari and to purchase pound quantities of PCP. The purchase of $56,000 of PCP was to take place at Heuer's Restaurant in Chicago. The package of PCP arrived at Heuer's Restaurant in an automobile owned and driven by defendant Scafidi. Scafidi handed the package containing some $56,000 worth of PCP to a co-conspirator. At that point federal agents effected several arrests.

Based on this evidence the inferences that Scafidi was aware of others in a conspiracy to distribute PCP and that Scafidi acted in furtherance of the conspiracy are reasonable. As we said in *Varelli,* various individuals may join and terminate their participation in a single ongoing conspiracy at different stages. Thus, the fact that Scafidi's involvement was limited to this one transaction and there is no evidence of Scafidi's participation in the November 30th sale of PCP does not negate the reasonable inference that Scafidi was a participant, albeit a late entrant, in a single ongoing conspiracy. The evidence established an agreement among co-conspirators to distribute PCP to agent Petz in separate transactions and it is reasonable to infer from the nature of Scafidi's involvement that he was aware of the agreement with others to distribute PCP. That is what the indictment charged. *See United States* v. *Friedman,* 593 F.2d 109; *United States* v. *Burman,* 584 F.2d at 1356-57. Scafidi's participation as a link in the chain of one such transaction involving $56,000 worth of PCP sufficiently connected him with the agreement to distribute PCP.[7]

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[7] Scafidi argues that *United States* v. *Lindsey,* 602 F.2d 785 (7th Cir. 1979), compels a reversal. Since we find that the factual conclusion that the evidence showed a single conspiracy was not clearly erroneous, we do not reach the *Lindsey* question.

Motion for Severance

Scafidi's final argument is that the trial court erred in not granting his motion for a severance. He cites *United States* v. *Kaplan,* 588 F.2d 71 (4th Cir. 1978), for the proposition that severance was mandatory and the failure to sever him requires a reversal. This court has said that a motion for severance dies within the discretion of the trial judge and a "strong showing of prejudice" is required for reversal of the trial judge's decision. *United States* v. *Dalzotto,* 603 F.2d 642, 646 (7th Cir.), *cert. denied,* 100 S. Ct. 530 (1979). Since we have found that the evidence established that Scafidi was a participant in the single ongoing conspiracy charged in the indictment, we find *Kaplan* distinguishable and conclude that the trial court acted within its discretion in denying Scafidi's motion for a severance.

Accordingly, we affirm the convictions.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 9, 1980

Before
Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Nos. 79-1812 and 79-1826 vs.

GREGORY ANDREW SCAFIDI and
EDWIN SHEMWILL,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-CR-909—JOHN F. GRADY, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendants-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It Is Ordered that the aforesaid petition for rehearing be, and the same is hereby, Denied.

APPENDIX C

Table 59
Trials Completed in the United States
District Courts During the Twelve Month Periods
Ended June 30, 1962-1979

Year	Criminal		
	Total	Non-Jury	Jury
1962	3,788	1,090	2,698
1963	3,865	1,159	2,706
1964	3,924	1,076	2,848
1965	3,872	1,143	2,729
1966	4,410	1,239	3,171
1967	4,405	1,345	3,060
1968	5,533	1,800	3,733
1969	5,563	1,883	3,680
1970	6,583	2,357	4,226
1971	7,456	2,923	4,533
1972	7,818	2,968	4,850
1973	8,571	2,927	5,644
1974	7,600	2,753	4,847
1975	7,633	2,726	4,907
1976	7,924	2,773	5,151
1977	7,222	2,661	4,561
1978	7,336	3,344	3,992
1979	6,799	3,132	3,667
Percent Change 1979 over 1978	—7.3	—6.3	—8.1

The increase in the length of overall trials is also reflected in jury trials. Jury trials lasting only one day declined to 1,066 in 1979, a drop of 11.8 percent from 1978 and 58.4 percent from the number of one day trials completed in 1973. The greatest increases in jury trials were experienced in trials of 4-9 days and those 20 days or more, both of which increased 5.0 percent in 1979. The percent of jury trials lasting 4 days or more increased from 33.9 percent in 1978 to 35.9 percent in 1979. This continues a steady rise in this figure from 1972.

Appendix table C-8 provides data on the type and length of civil and criminal trials completed in the district courts during the twelve month period ended June 30, 1979. The largest portion of civil nonjury trials lasting 4 days or more were civil rights trials, which accounted for 28.5 percent of the 799 such trials completed. Trials related to personal injury suits represented 558 (46.2 percent) of the 1,208 civil jury trials completed in 1979 which lasted 4 days or more. The largest number of criminal nonjury trials lasting four days or more in 1979 were cases related to drug law violations (30.2 percent) and fraud cases (28.6 percent). Similarly, the largest numbers of criminal jury trials lasting 4 days or more were also related to drug law violations (25.0 percent) and fraud cases (25.0 percent).

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs. No. 78 CR 904

.....

WAIVER OF TRIAL BY JURY
(Filed June 8, 1979)

Comes ..... defendant in the above entitled cause, in his own proper person by ..... his attorney, and the defendant having been advised by the court in open court of his right to a trial by jury hereby waives this right and consents to a trial by the court without a jury.

/s/ .....
Defendant

/s/ .....
Attorney for Defendant

Thomas P. Sullivan, United States Attorney for the Northern District of Illinois, hereby consents to the waiver by the defendant above named of a trial by jury of the above-entitled cause.

Thomas P. Sullivan,
United States Attorney
By /s/ .....
Assistant United States Attorney

Approved:
/s/ .....
United States District Judge
